Fimbank Plc v Owners and/or Demise Charterers of the Ship or Vessel 'Nika' now known as 'Bao Lai'

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02 (IM)(ADM)-1031–06 OF 2022
AZIZAH NAWAWI, HADHARIAH SYED ISMAIL AND AHMAD ZAIDI JJCA
14 JUNE 2023

Civil Procedure — Admiralty in rem — Writ — Renewal of — Whether O 6 r 7(2) of Rules of Court 2012 ('ROC') allowed an admiralty in rem writ to be renewed for a maximum of five times — Whether extending the writ's validity beyond five times would defeat the purpose of having O 6 r 7(2) — Whether since O 6 r 7(2) was clear and unambiguous, no lacuna existed for court to exercise its inherent jurisdiction under O 92 r 4 ROC to allow the writ to be renewed for a sixth time

The issue in this case was whether the validity period for service of a writ in rem in an admiralty action could be renewed for a sixth time when O 6 r 7(2) of the Rules of Court 2012 ('the ROC') only allowed for five renewals of the writ on the ground that previous attempts to serve it on the defendant had been unsuccessful. The appellant, a Maltese bank and trade financier, had taken out a writ in rem dated 17 May 2019 against the respondent owners of a vessel named 'NIKA'. The appellant claimed damages from the respondent for allegedly delivering its cargo on board the vessel to unauthorised third parties. Order 70 r 7(1) of the ROC required the writ to be served on the vessel NIKA itself if it came into Malaysian waters in the manner prescribed by O 70 r 10. The appellant contended that the writ could not be served because NIKA never entered Malaysian waters. Hence, before the writ was first due to expire on 16 November 2019, the appellant obtained an order to have it renewed for six months. Thereafter, the writ was similarly extended four more times on six-monthly periods. Before the writ was finally due to expire on 16 May 2022, the appellant applied for the sixth time to extend its validity period for a further six months. The High Court refused the application on the ground that O 6 r 7(2) specifically provided for only five renewals of the writ and the appellant could not ask the court to exercise its inherent jurisdiction to override that provision. In the instant appeal against the decision, the appellant contended that it was not at fault for the failure to effect service of the writ and submitted that it would suffer grave injustice if the writ was not renewed because the appellant could neither file a fresh writ against the respondent for the same cause of action because limitation had set in nor could it pursue a claim in personam against the present owner of the vessel because it was not the party with whom the appellant had had a contract. The appellant submitted that the

extension of five times stated in O 6 r 7(2) should not be taken to be absolute as to do so would deprive it of its substantive rights against the respondent.

Held, unanimously dismissing the appeal:

(1) The High Court judge had applied his mind correctly to O 6 r 7(2) of the ROC which limited the renewal of a writ in an admiralty action to five times only and therefore the court was not allowed to grant the sixth renewal (see para 26).

(2) In view of the specific provision with regard to the number of renewals allowed under O 6 r 7(2) of the ROC there was no lacuna existing for the court to exercise its inherent jurisdiction under O 92 r 4 of the ROC. The High Court was not plainly wrong in holding that the writ could not be perpetually renewed until such time the vessel came into Malaysian waters for service to be effected as that would defeat the purpose of having O 6 r 7(2) of the ROC (see paras 27–29).

[Bahasa Malaysia summary

Isu dalam kes ini adalah sama ada tempoh sah untuk penyampaian writ in rem dalam tindakan admiralti boleh diperbaharui buat kali keenam apabila A 6 k 7(2) Kaedah-Kaedah Mahkamah 2012 ('KKM') hanya membenarkan untuk lima pembaharuan writ tersebut atas alasan bahawa percubaan sebelumnya untuk penyampaiannya kepada defendan tidak berjaya. Perayu, sebuah bank Malta dan pembiaya perdagangan, telah mengeluarkan writ in rem bertarikh 17 Mei 2019 terhadap responden pemilik kapal bernama 'NIKA'. Perayu menuntut ganti rugi daripada responden kerana didakwa menghantar kargonya di atas kapal kepada pihak ketiga yang tidak dibenarkan. Aturan 70 k 7(1) KKM menghendaki writ disampaikan ke atas kapal NIKA tersebut sendiri jika ia masuk ke perairan Malaysia mengikut cara yang ditetapkan oleh A 70 k 10. Perayu berhujah bahawa writ tersebut tidak boleh disampaikan kerana NIKA tidak pernah memasuki perairan Malaysia. Oleh itu, sebelum writ tersebut pada mulanya tamat tempoh pada 16 November 2019, perayu mendapat perintah untuk memperbaharuinya selama enam bulan. Selepas itu, writ tersebut juga dilanjutkan empat kali lagi pada tempoh enam bulan. Sebelum writ tersebut akhirnya tamat pada 16 Mei 2022, perayu memohon buat kali keenam untuk melanjutkan tempoh sah lakunya selama enam bulan lagi. Mahkamah Tinggi menolak permohonan tersebut atas alasan bahawa A 6 k 7(2) secara khusus memperuntukkan hanya lima pembaharuan writ dan perayu tidak boleh meminta mahkamah melaksanakan bidang kuasa sedia ada untuk melangkaui peruntukan tersebut. Dalam rayuan semasa terhadap keputusan tersebut, perayu berpendapat bahawa ia tidak harus dipersalahkan atas kegagalan melaksanakan penyampaian writ tersebut dan berhujah bahawa ia akan mengalami ketidakadilan yang serius jika writ tersebut tidak diperbaharui kerana perayu tidak boleh memfailkan writ baharu terhadap responden atas kausa tindakan yang sama kerana had masa telah berjalan dan

tidak boleh meneruskan tuntutan secara peribadi terhadap pemilik kapal tersebut kerana ia bukan pihak yang mempunyai kontrak dengan perayu. Perayu berhujah bahawa lanjutan lima kali yang dinyatakan dalam A 6 k 7(2) tidak boleh dianggap mutlak kerana ia akan melucutkan hak substantifnya terhadap responden.

Diputuskan, sebulat suara menolak rayuan:

(1) Hakim Mahkamah Tinggi telah menggunapakai niatnya dengan betul terhadap A 6 k 7(2) KKM yang mengehadkan pembaharuan writ dalam tindakan admiralti kepada lima kali sahaja dan oleh itu mahkamah tidak dibenarkan membenarkan pembaharuan kali keenam (lihat perenggan 26).

(2) Memandangkan peruntukan khusus berkenaan dengan bilangan pembaharuan yang dibenarkan di bawah A 6 k 7(2) KKM, tiada lacuna yang wujud bagi mahkamah untuk menjalankan bidang kuasa sedia ada di bawah A 92 k 4 KKM. Mahkamah Tinggi tidak secara nyata terkhilaf dalam memutuskan bahawa writ tersebut tidak boleh diperbaharui selama-lamanya sehingga suatu masa kapal tersebut masuk ke perairan Malaysia untuk penyampaian dapat dilaksanakan kerana itu akan menggagalkan tujuan adanya A 6 k 7(2) KKM (lihat perenggan 27–29).]

Cases referred to

Arab-Malaysian Credit Bhd v Tan Seang Meng [1995] 1 MLJ 525, CA (refd)
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)
Samsung Corp v Chinese Chamber Realty Pte Ltd and others [2004] 1 SLR 382; [2004] 1 SLR (R) 382, CA (refd)
Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd [1996] 2 MLJ 334, HC (refd)

Legislation referred to

Rules of Court 2012 O 3 r 5, O 6 rr 7, (1), (2), (2A), O 70 rr 7(1), 10, O 92 r 4

Appeal from: *Fimbank Plc v The Owners and/or Demise Charterers of The Ship or Vessel 'Nika' Now Known As 'Bao Lai'* [2022] MLJU 135 (High Court, Kuala Lumpur)

Arun Krishnalingam (Christopher & Lee Ong) for the appellant.

Hadhariah Syed Ismail JCA:

INTRODUCTION

[1] The appeal by the appellant (plaintiff) is against the decision of the High Court given on 12 May 2022, dismissing the appellant's notice of application (encl 46) to extend the validity of the writ in rem for the sixth time.

[2] This appeal raised the issue of whether the court can extend the validity of an admiralty writ in rem beyond the fifth time as prescribed under O 6 r 7(2) of the Rules of Court 2012.

[3] We heard and dismissed the appeal on 15 November 2022.

BRIEF FACTS

[4] The appellant, Fimbank PLC is a Maltese bank and a trade financier. The respondent are the former owner of the vessel 'NIKA'.

[5] On 17 May 2019, the appellant filed a writ in action in rem against 'The Owners and/or Demise Charterers of the ship or vessel 'NIKA'. The writ is endorsed with the following claims:

> The plaintiffs (appellant herein), as persons entitled to immediate possession of and/or having other legal or equitable interests in and/or having rights of suit in respect of a cargo of approximately 17,300 MT of Ukrainian Milling Wheat from the Latest Crop (2017) (the Cargo) shipped on board the vessel 'NIKA' (IMO No.9254513) (the Vessel) for carriage from Chornomorsk, Ukraine to one Egyptian Mediterranean Port under the Bills of Lading BL Nos 1 to 26 and BL No. 61 dated on or about 22 March 2018 (Bills of Lading), and/or as lawful holders and/or indorsees of the Bills of Lading, claim against the defendants (the respondents) as carriers and/or persons being in physical possession of the cargo. The plaintiffs' claims are for:
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> (a) Damages for breach of the contract(s) of carriage contained in and/or evidenced by the Bills of Lading, and/or breach of duty, and/or negligence, and/or breach of duty as bailees, and/or wrongful interference, and/or injury to the plaintiffs' interests in the Cargo by the defendants, their servants and/or agents in and about the bailment, loading, stowage, handling, custody, care, discharge and delivery of the Cargo and the shipment and carriage thereof on board the Vessel on or around the date and for the voyage as specified in the Bills of Lading, and/or for a declaration for indemnity in respect of all loss, liability, costs and/or expenses suffered and/or incurred or which may be suffered and/or incurred by the plaintiffs as a result of the defendant's breaches as aforesaid;
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> (b) Interest;

(c) Costs; and

(d) Other relief deems fit by the Court.

[6] In summary, the appellant's claim is for misdelivery of the cargo by the respondents to unauthorised third parties without presentation of the original bills of lading which at all material times were in the appellant's possession.

[7] Order 70 r 7(1) of the Rules of Court 2012 ('the ROC') states 'a writ by which an action in rem is begun shall be served on the property against which the action is brought'. Put simply, it means the writ was to be served on the vessel NIKA itself, in the manner prescribed by O 70 r 10 of the ROC and substituted service could neither be ordered nor effected.

[8] Pursuant to O 70 r 7(1), the writ could only be served on the vessel 'NIKA' if it comes into Malaysian waters.

[9] A writ is valid for six months from the date it was issued. This is provided for in O 6 r 7(1) of the ROC wherein it is stated 'a writ is valid at first instance for six months beginning from the date of its issue. Thus, having filed the writ on 17 May 2019, it is valid until 16 November 2019.

[10] Therefore, the appellant is required to serve the writ on the vessel on or before 16 November 2019.

[11] If a writ cannot be served on the vessel within its validity period of six months, the appellant can apply to court under O 6 r 7(2) to extend the validity of the writ. Order 6 r 7(2) reads as follows:

> Subject to paragraph (2A),where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions five times), not exceeding six months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

[12] Order 6 r 7(2A) reads as follows:

> An application for a renewal of writ must be made before the expiry of the writ, ex parte by notice of application supported by affidavit showing that efforts have been made to serve the defendant within one month from the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

[13] In *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329, Zaki Azmi CJ said:

A [39] I strongly believe that O 6 r 7(2A) of the RHC was introduced to prevent abuse by the plaintiffs in filing writs and sleeping on them without making efforts to serve them. This practice of inactivity is something which courts loathe. It is against the administration of justice. It creates a backlog and results in a false number of pending cases. In my opinion, courts should take serious a view of such cases. If not, B they will continue to remain in the list of outstanding cases. As such, O 6 r 7(2A) of the RHC must be strictly enforced as required by the rule.

[40] When plaintiffs apply to extend the validity of writs, courts should examine closely the affidavits filed in support of applications for extensions. Before granting an extension, courts must be satisfied that serious efforts had been made to serve. A C simple and plain statement that efforts had been made to serve cannot be a sufficient ground. The affidavits must provide detailed facts as to when, where and how attempts to serve were made. Otherwise O 6 r 7(2A) RHC will become a dead letter. The object of the rule will be defeated.

D **[14]** Until now, the writ in this case remains unserved as the vessel has not been into Malaysian waters since the writ was issued in May 2019 for service to be effected. Prior to this, the appellant has made five applications to extend the validity of the writ to which the court had granted five extensions as follows:

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Extension	Application	Order	Duration
First	15 November 2019	5 December 2019	17 November 2019 – 16 May 2020
Second	6 May 2020	15 May 2020	17 May 2020 – 16 November 2020
F Third	16 November 2020	16 November 2020	17 November 2020 – 16 May 2021
Fourth	5 May 2021	11 May 2021	17 May 2021 – 16 November 2021
G Fifth	10 November 2021	15 November 2021	17 November 2021 – 16 May 2022

[15] By notice of application dated 13 April 2022 (encl 46), the appellant applied under O 6 r 7 and/or O 3 r 5 and/or O 92 r 4 of the Rules of Court H 2012 to extend the validity of the writ for a further six months from 17 May 2022.

[16] In the affidavit in support of the application, the appellant gives the reasons for not effecting service as follows:

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(a) the vessel has not been into Malaysian waters for the period from 17 May 2019 to 16 May 2022 for service to be effected;

(b) the appellant has been constantly and diligently monitoring the movement of the vessel through the use of the services provided by

Llyod's List Intelligence and/or Marine Traffic, to see whether or not it has been into Malaysian waters, and to the best of the appellant's knowledge it has not done so; and

(c) as the vessel has not been into Malaysian waters in all that time, the appellant has not had any reasonable opportunity to effect service, and non-service is not from any default or lack of effort by the appellant.

[17] Before the High Court, learned counsel for the appellant submitted that manifest injustice will be caused to the appellant if the validity of the writ is not extended due to the following reasons:

(a) the ownership of the vessel has changed hands three times:

(i) from Discover Investment Corp to Anchor Nautical SA (Anchor);

(ii) thereafter, from Anchor to Bluefish Marine Corp (Bluefish);

(iii) thereafter, from Bluefish to Bao Yi Shipping Co Ltd (Bao Yi).

(b) with the transfer of ownership, the appellant cannot issue a fresh admiralty in rem writ for the same claim against Bao Yi Shipping Co Ltd, who is not the party liable in personam for the appellant's claim;

(c) the appellant also cannot file a fresh writ against Discover Investment Corp because any new claim would be barred by limitation;

(d) appellant should not be penalised by a procedural rule that is primarily intended to prevent a plaintiff's lack of action and abuse; and

(e) if the writ was not renewed, the appellant would be deprived of its substantive rights through no fault of its own and would be deprived of its remedies in law. That in itself would be manifestly unjust and contrary to the administration of justice, which could never have been the intent of the five time extension limit under O 6 r 7(2) of the ROC 2012.

[18] In view of the express limitation of five times extension only allowed under O 6 r 7(2), learned counsel for the appellant urged the High Court to exercise its discretion under O 92 r 4 of the ROC, citing *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525.

[19] Order 92 r 4 of the ROC provides:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[20] The facts of the case in *Arab-Malaysian Credit Bhd v Tan Seang Meng* is as follows. The plaintiff had granted banking facilities to a company which the

defendant had guaranteed repayment of. When the plaintiff could not personally serve the writ it had filed on August 1985 on the defendant, it applied and obtained a substituted service order. The defendant failed to enter an appearance. In May 1986, the plaintiff entered a default judgment against him. It was only in August 1992 under threat of bankruptcy that the defendant applied to set aside the default judgment. He succeeded in setting aside the default judgment on the ground that the substituted service was fatally flawed. As a result, the writ was deemed to have never been served on him. The plaintiff cannot re-served the writ as its' validity has long expired. The plaintiff also cannot file a fresh claim against the defendant as it is time-barred. The plaintiff then filed eight separate applications to extend the validity of the writ. The High Court dismissed the applications. The plaintiff appealed to the Court of Appeal. In allowing the appeal, Gopal Sri Ram JCA said:

> Having addressed our minds to the plain words of O 6 r 7, and the decided cases in which it has been considered, we are satisfied that the High Court had ample jurisdiction to grant the plaintiff in the instant case the several extensions sought by it of its writ. Quite apart from O 6 r 7, there is wide power under O3 r 5 conferred upon the High Court to extend time. Even the restriction of granting more than one extension of 12 months expressed in O 6 r 7 may, in appropriate cases, be overcome by having resort to O 92 r 4 (absent in the English RSC) which is jurisdictional provision (see *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143.) Further, in a recent and yet unreported judgment of this court, reference has been made to the important principle that a of court should not be construed so as to produce unfairness or a manifest injustice (see *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd, Court of Appeal Civil Appeal No P-02–7–94 (since reported in* [1995] 1 MLJ 292)). Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to a rule of court will result in injustice'. In the premises, we are satisfied that the learned judge was clearly wrong in holding that the court had no jurisdiction to make the orders it did.

[21] The learned judicial commissioner declined to follow *Arab-Malaysian Credit Bhd v Tan Seang Meng* because that case deals with the old O 6 r 7 which does not limit the validity of a writ to be extended to five times only. Instead, the learned judicial commissioner preferred to rely on the following two cases:

(a) *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd* [1996] 2 MLJ 334; and

(b) *Samsung Corp v Chinese Chamber Realty Pte Ltd and others* [2004] 1 SLR 382; [2004] 1 SLR (R) 382.

[22] In *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd*, VC George J said:

> The court has always had an inherent jurisdiction to regulate its own proceedings. Order 92 r 4 of the Rules of the High Court 1980 recognises this to be the position.

> However, that is not to mean that the judge may ignore express rules of court and make his own rules of practice and procedure inconsistent with written rules and time honoured practices. There is no doubt that from time to time, established rules and practices become outdated. For instance, there are rules and practices that make for extended trials. Some of these rules and practices could perhaps be done away with or at least streamlined. New rules could be brought in. However, it is not open to individual judges or even for the conference of judges to take it upon himself or itself to do away with or streamline or adopt innovative procedures. However well intentioned, that sort of thing, if permitted, could lead to a form of anarchy. If changes are called for, what has to be done is to have the rules committee — the members of which are carefully selected from the Bench and from members of the Bar and includes the Attorney General or his representative and which is headed by none other than the Chief Justice — give due consideration to the new ideas and have the rules duly amended. And until such amendments are effected, the old rules and practices cannot be ignored and new procedures may not be implemented. However, where there is a lacuna in the rules and practice, then and only then, may the aforesaid inherent jurisdiction be invoked.

[23] In *Samsung Corp v Chinese Chamber Realty Pte Ltd and others*, Chao Hick Tin JA said:

> We endorse the views of the judge that generally where the Rules of Court have expressly provided what can or cannot be done in a certain circumstance, it is not for the court to override the clear provision in exercise of its inherent powers. No court should arrogate unto itself a power to act contrary to the Rules. The rule making powers are conferred upon the Rules Committee. The court should not usurp the powers and functions of the Rules Committee.

THE HIGH COURT'S DECISION

[24] After considering the law and the cases cited by counsel for the appellant, the learned judicial commissioner dismissed the appellant's application to extend the validity of the writ for the sixth time on the following grounds:

(a) that O 6 r 7(2) of the ROC is a specific provision to cater for renewal of admiralty writ in rem and it only allow a maximum of five renewals;

(b) that O 92 r 4 of the ROC is not applicable as there was no lacuna in the rules to necessitate the court to exercise it's inherent jurisdiction;

(c) that the Rules Committee had seen fit to permit only five times of extensions of writs in rem;

(d) that the Rules Committee had not seen fit to amend the Rules of Court notwithstanding developments in the procedural rules of other jurisdiction; and

(e) that the court should not usurp the power and function of the Rules Committee.

THE APPELLANT'S SUBMISSION

[25] The appellant submits that the High Court erred in holding that:

(a) there was no lacuna in the law by reason of the 'cap' provided in O 6 r 7(2) of the ROC;

(b) O 92 r 4 of the ROC is not applicable to overcome the limit imposed under O 6 r 7(2) of the ROC;

(c) the limit of five times renewal under O 6 r 7(2) is absolute irrespective of the fact that in this case it is impossible to effect service; and

(d) the sixth extension sought by the appellant would have the effect of the High Court usurping the powers and functions of the Rules Committee.

OUR DECISION

[26] We disagree with the appellant's submission. We find the learned judicial commissioner had applied his mind correctly to O 6 r 7(2) of the ROC which limit renewal of a writ in admiralty action to five times only and therefore the court is not allowed to grant the sixth renewal.

[27] In view of the specific provision with regard to the number of renewals allowed under O 6 r 7(2) of the ROC, we also agree with the learned judicial commissioner that there is no lacuna in the provision of the rules with regards to the renewal of the writ in admiralty action.

[28] We find the learned judicial commissioner did not err in refusing to apply O 92 r 4 of the ROC, as there is a specific provision on the renewal of the writ in admiralty action under O 6 r 7(2). Added to that, we find that the learned judicial commissioner was not plainly wrong on the interpretation of O 6 r 7(2) of the ROC on the ground that if the court grant the sixth renewal, when will the renewal stop if the vessel still did not come into Malaysian water four years from now. Does it mean that the court should continue granting extensions until the vessel come into Malaysian water? If these were to happen, it would defeat the purpose of having O 6 r 7(2) of the ROC.

[29] For the aforesaid reasons, we find the learned judicial commissioner had not erred in his decision to adhere to O 6 r 7(2) of the ROC. The appeal is therefore dismissed.

Appeal dismissed.

Reported by Ashok Kumar